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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1920, No. 786

CHARLES OLIN,

Appellant,

v.

PERRY KITZMILLER, R. C. CLANTON,
CARL SHOEMAKER, BEN W. OLCOTT,
I. N. FLEISCHNER, C. F. STONE,
MARION JACK AND FRANK WARREN,

Appellees.

Appeal from the United States Circuit Courts of Appeals for the Ninth Circuit

Filed March 7, 1922
(28,143)

POINTS AND AUTHORTIES

I

The title to fish and game within the state of Oregon is in the state in trust for its citizens and not in trust for non-residents or aliens, and the state has power to limit

the right to take or catch such fish to residents and to citizens of the United States.

Eagle Cliff Fishing Co, v. McGowan, 70 Or. 1.
State v. Hume, 52 Or. 1 and 5.
Portland Fish Co, v. Benson, 56 Or. 147, 154; 108 Pac. 122.
Monroe v. Withycombe, 84 Or. 328, 335, 337, 341; 165 Pac. 227, 229.
State v. Savage, 184 Pac. 567, 96 Or. 53.
State v. Blanchard, 189 Pac. 421, 96 Or. 79.

II

No fishing rights of any kind can be obtained in the state of Oregon by custom or usage. If appellant's fishing gear consisted of fixed appliances, his prior right, if any, to a license was based wholly upon statutory provisions.

Hume v. Rogue River Packing Co, 51 Or. 237, 241-261.
State v. Hume, 52 Or. 1, 5-7.
Union Fishermen's Co. v. Shoemaker, 98 Or. 659, 673-676.
Chapter 128, General Laws of Oregon, 1913.
Sections 2, 3, and 5, Chapter 188, General Laws of Oregon, 1915.
Monroe v. Withycombe, 84 Or. 328, 336-39.
State v. Blanchard, 96 Or. 79, 87.
Williams v. Seufert Bros. Co. 96 Or. 163, 174, 180.
Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1.

III

The concurrent jurisdiction of the state of Washington does not extend to the matter of issuing licenses for the operation of fixed appliances within that part of the waters of the Columbia river between said states

which is within the territorial limits of the state of Oregon.

In re Mattson, 69 Fed. 535.
Nielson v. Oregon, 212 U. S. 315, 53 L. Ed. 528, 530.
Nicoulin v. O'Brien, 172 Ky, 473, 80.
Nicoulin v. O'Brien, 248 U. S. 113, 63 L. Ed.
Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1.
McGowan v. Columbia River Packers' Assn. 245 U. S. 352, 62 L. Ed. 342, 344.

IV

If the compact constituted a contract between the states of Oregon and Washington and Section 5 of Chapter 188, General Laws of Oregon, 1915, as amended by Chapter 292, General Laws of Oregon, 1919, violates the obligation of that contract, a proceeding to have same adjudged invalid on that account can only be instituted by the other party to the compact, a person for whose benefit it was made, or one whose vested property rights under the compact are injuriously affected by the amendment.

Any prior right to a license that appellant may have had was not conferred by the compact, but by the state, and was subject to the sovereign power of the state to modify or entirely withdraw the privilege.

Since the compact was not made for the benefit of appellant and did not guarantee him any right of priority to a license or that a license of any kind would be issued to him, he is not a proper party to bring this action.

The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 629; 4 L. Ed. 629, 657.
Georgetown v. Alexandria Canal Co., 12 Peters 91, 99; 9 L. Ed. 1012-1016.
Bodley v. Taylor, 5 Cranch 191, 223; 3 L. Ed. 75, 84.

German Alliance Insurance Co. v. Home Water Supply Co., 226 U. S. 220, 230; 57 L. Ed. 195, 199.

Clark v. Kansas City, 176 U. S. 114; 20 Sup. Ct. S. C. T. 284; 44 L. Ed. 392, 396.

Lampasas v. Bell, 180 U. S. 276; 21 Sup. Ct. 368; 45 L. Ed. 527.

Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20; 47 L. Ed. 70, 75.

Williams v. Eggleston, 170 U. S. 304; 42 L. Ed. 1047, 1049.

Stone v. Miss., 101 U. S. 814; 25 L. Ed. 1079.

Cram v. Chicago, etc., R. Co., 85 Neb. 586, 19 Ann. Cas. 170.

Parker v. Jeffery, 26 Or. 186, 188.

Hooker v. Burr, 194 U. S. 415, 48 L. Ed. 1046, 1050.

V

The compact does not prevent either state from passing laws in the matter of regulating, protecting and preserving fish which do not affect the concurrent jurisdiction.

Nicoulin v. O'Brien, 172 Ky. 473, 480.

Nicoulin v. O'Brien, 248 U. S. 113, 63 L. Ed. 155.

Neilson v. Oregon, 212 U. S. 315, 53 L. Ed. 528, 530.

Olin v. Kitzmiller (Memo. opinion on same case in U. S. Dist. Court for Oregon.)

Union Fishermen's Company v. Shoemaker, 193 Pac. 476, 194 Pac. 854, 98 Or. 659, 678.

VI

If the conspiracy charged in the complaint did in fact exist and the statute complained of was enacted as a result thereof, its validity would not be affected

thereby. Courts will not inquire into the motives or policy of the legislature in enacting laws.

2 Lewis' Sutherland Stat. Const. Sec. 496, page 925.

6 Am. & Eng. Enc. of Law, 2nd ed, 1087 and cases cited.

Fletcher v. Peck, 6 Cranch 97.

Doyle v. Continental Ins. Co. 94 U. S. 535.

Rose's Notes (Rev. ed.), Vol. 9, p. 746 and cases cited.

Stoppenback v. Multnomah County, 71 Or. 493, 509.

ARGUMENT

There is some conflict in the allegations of appellant's complaint as to whether or not the license involved was for the operation of set appliances or for other types of fishing gear. In paragraph 3 of the complaint appellant alleges that by reason of existing laws and recognized customs he was entitled to, and had been issued, licenses by the state of Oregon for many years to follow his occupation as a salmon fisherman in the waters of the Columbia river over which the states of Oregon and Washington have concurrent jurisdiction, and that he had filed proper application with the authorities of the state of Oregon for a license to catch and take salmon in said waters by means of a set net for the year 1919. In paragraph 17 of the complaint, page 34 of the abstract, appellant alleges

> that the fishing gear and appliances used by complainant in fishing the waters of the Columbia river over which the states of Oregon and Washington have concurrent jurisdiction, in the hereinbefore described locations, is a floating gear and gillnet and is not a fixed appliance or stationery fishing gear.

The following statement on page 67 of the appellant's brief, beginning on the fifth line from the bottom of said page

> The provision which deprives unnaturalized foreign residents to fish with fixed appliances which we understand affect only two existing licenses for locations * * *

clearly indicates that the appellant recognizes the fishing gear which he proposed to operate under the license involved in this proceeding to consist of fixed appliances.

The facts stated in paragraph 17 are set forth as a further and separate cause of suit. Under rule 26 of the New Equity Rules, 1912, the plaintiff may join in one bill as many causes of action cognizable in equity as he may have against the defendant, but said paragraph 17 does not of itself set up any cause of suit or attempt to set forth any different cause of action than is attempted to be set up by the other allegations of the complaint.

It is apparent that appellant did not have two or more different kinds of fishing gear and that his apparent attempt to set up two separate and distinct causes of action arising out of the same facts was intended merely as an explanation of the kind or type of fishing gear referred to in the complaint. It is elementary that further and separate causes of suit must arise out of different conditions or state of fact. If it was intended to set up in paragraph 17 a cause of suit arising out of the effect of the amendment of 1919 upon plaintiff's rights as the owner of a fishing gear separate and distinct from that referred to in the other paragraph of the complaint, the said paragraph is totally insufficient to set up such a cause of action. Apparently such was not the intent, but said paragraph 17 was intended to be in explanation of the character of fishing gear elsewhere

referred to in the complaint. If the description of the gear as contained in said paragraph 17 is correct, the only right that appellant had under the 1915 statutes was the privilege of exercising a right to fish, common to all the citizens of the state of Oregon, and by his pleading he has deprived himself of any right to priority that may have existed in favor of licensees of fixed appliances. It is apparent that the theory upon which this suit is brought is that appellant had acquired some property interest or vested right under the statutes of 1915 of which he is deprived by the statute of 1919.

Sections 2 and 3 of Chapter 188, General Laws of Oregon, 1915, provide:

> Section 2. The failure to renew the license, or make application therefor, for any fish trap, pound net, fish wheel, or location for other fixed appliance, in any of the waters of this state on the first day of April of any year, shall constitute abandonment of the location.
>
> Section 3. Should the holder of any license neglect to construct the appliance called for by said license during two consecutive seasons covered by his license, said location shall be deemed abandoned.

In the case of *Monroe v. Withycombe*, 84 Or. 328, the question of the right of the Master Fish Warden of the state to grant to one person an exclusive right to use fixed appliances for fishing in waters where all citizens have the right to fish was involved. The court held that such license could not be granted because when that which belongs equally to all the citizens of the state is taken from all and vested in only one citizen it is equivalent to transforming a public right into a monopoly exercisable by only one citizen and therefore violative of Article 1, Section 30 of the Constitution, providing that no law shall be passed granting to any citizen or class

of citizens privileges or immunities which on the same terms shall not equally belong to all citizens. The licenses involved purported to authorize the holder to construct and maintain three pound net fish traps at designated places in the Columbia river. At page 337 of the report Mr. Justice Harris, who delivered the opinion of the court, said:

> Not even the legislature could have granted to Farrell the exclusive right to take salmon in waters where all the qualified citizens of Oregon have the common right to take floating fish; and therefore the licenses issued by the Master Fish Warden do not legalize the construction of traps which Farrell purposes to build. The question presented here is not whether all pound net fish traps are per se unlawful; but the sole question for decision is whether the traps which Farrell purposes to build would be unlawful, and that question is determined by the effect which it is conceded that the traps would have upon the common right of all the qualified citizens of this state.

The principle that there can be no priority in the right to a license to fish in the waters of the Columbia river that will interfere with rights common to all the citizens of the state is well established.

Hume v. *Rogue River Packing Co.* 51 Or. 237, 259. (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 131 Am. St. Rep. 732, 31 L. R. A. (N. S.) 396).

Eagle Cliff Fishing Co v. *McGowan*, 70 Or. 1 and 12, 137 Pac. 766.

State v. *Blanchard*, 189 Pac. 421, 96 Or. 79.

State v. *Savage*, 184 Pac. 567, 96 Or. 53.

Appellant's set nets are fixed appliances, and his right to priority, if it existed, was fixed by statute. (Secs. 2 and 3, Ch. 188 G. L. of Or. 1915.)

That prior rights to a license to fish or any kind of a fishing right can not be acquired in this state by usage or custom is definitely settled by the case of *Hume v. Rogue River Packing Co.* 51 Or. 237.

It clearly appears that, if the license of which appellant claims to have been unlawfully deprived was for the operation of floating gear, custom and usage would not establish any right to priority to such a license, but that the right to same was free and open to all the citizens of the state. By grace of the statutes of this state the same right was extended to aliens upon certain conditions, but the right thus extended was a mere license or privilege subject to withdrawal or modification at any time by the people of the state acting through the legislature.

The single question presented in this proceeding is whether or not if the compact between the states of Oregon and Washington is a contract it conferred upon the appellant vested property rights that would be affected to his injury through the enforcement of Section 5 of Chapter 188, General Laws of Oregon, 1915, as amended by Chapter 292, General Laws of Oregon, 1919, and whether if it did thus affect plaintiff's rights, that constituted an impairment of the contract.

The appellant has set out at some length the resolutions adopted by the legislatures of the states of Oregon and Washington preliminary to the adoption of the compact by said states, and contends that these preliminary resolutions and the remainder of the legislative acts of said states in which the compact is contained constitute a part thereof. This argument may be disposed of by referring to the terms of Section 20 of Chapter 188, General Laws of Oregon, 1915, part of which reads as follows:

> "We further recommend that a resolution be passed by the legislatures of Washington and

Oregon, whereby the ratification by Congress of the laws of the states of Oregon and Washington shall act as a treaty between said states, subject to modification only by joint agreement by said states:" and said recommendation having been approved by resolution adopting the report of the conference committee, then, and in that event, there shall exist between the states of Oregon and Washington a definite compact and agreement, the purport of which shall be substantially as follows:

"All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states."

Section 116, page 115, General Laws of Washington for 1915 (Sec. 5150—116, Remington's 1915 Codes and Statutes of Washington), is substantially to the same effect.

An act of congress of April 8, 1918 (U. S. Compiled Statutes ——), entitled

An act to ratify a compact and agreement between the states of Oregon and Washington regarding concurrent jurisdiction over waters of the Columbia river and its tributaries in connection with regulating, protecting and preserving fish, reads as follows:

"(Columbia River Concurrent State Jurisdiction Over Waters.) That the congress of the United States of America hereby consents to and ratifies the compact and agreement entered into between the states of Oregon and Washington relative to regulating, protecting and preserving

fish in the boundary waters of the Columbia river and other waters, which compact and agreement is contained in section 20 of chapter 188 of the General Laws of Oregon for 1915, and section 116, chapter 31, of the session laws of Washington for 1915, and is as follows:

"'All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both states.'

"Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters."

It is obvious that the compact is limited in its scope to the following:

> All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states.

Appellant contends that the meaning of the term "concurrent jurisdiction" has been changed and enlarged by the compact. That term has often been judicially defined and its meaning as applied to the compact is not uncertain. The concurrent jurisdiction of the state of Oregon over the waters of the Columbia

river where same forms a common boundary was fixed by act of congress of February 4, 1859, admitting the state into the union, to be as follows:

> The state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering upon the said state of Oregon so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same, and said rivers and waters and all the navigable waters of said state shall be common highways and forever free, as well as to the inhabitants of said state and as to all other citizens of the United States without any tax, duty, impost or toll therefor.

In the decisions of the courts of the state of Oregon and of the United States construing this act no general rule has been announced, each case apparently having been decided according to the peculiar facts and circumstances involved.

In re Mattson, 69 Fed. 535, was a petition for writ of habeas corpus, the petitioner having been imprisoned upon conviction in the circuit court of the state of Oregon, for Clatsop county, of fishing on Sunday within the territorial limits of the state of Washington in violation of the laws of Oregon. The court held that the states of Oregon and Washington had jurisdiction over the bed of the Columbia river upon their respective sides to the middle of the channel, but that the word "concurrent," when applied to the jurisdiction of Oregon to enact penal laws to be enforced on the Washington side of the Columbia river, can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington or are already in force within its jurisdiction.

In *ex part Desjeiro*, 152 Fed. 1004, the court held that, although the common boundary of the states of

Oregon and Washington is the middle of the channel of the Columbia river and each of said states has concurrent jurisdiction over the entire river, a statute of the state of Oregon, declaring that it shall be unlawful for any person to take salmon in the waters of the state unless such person is a citizen of the United States and has declared his intention to become such and has been a bona fide resident of the state of Oregon or the states of Washington and Idaho for a period of six months, could not be enforced, for the reason that it had not been concurred in by the legislature of the state of Washington, no matter where on the river the act was committed.

In *State v. Neilson*, 51 Or. 588, the defendant, a resident of the state of Washington, was tried and convicted in a court of this state for fishing on the Washington side of the Columbia river with a purse net in violation of the laws of this state. At the time of his arrest fishing with a purse net was lawful under the laws of the state of Washington. The single question presented for determination was whether the law of Oregon prohibiting the taking of fish in the manner stated extended over the entire waters of the river or whether it was confined to the Oregon side. The court held that where adjoining states have concurrent jurisdiction on the waters forming the boundary, the laws of each state regulating the common right to take fish from such waters are valid and binding when not in conflict and that if there is a conflict, the law of that state which is the most restrictive in its character must prevail, and to that extent the state which first assumes, has jurisdicion to the exclusion of the other.

Upon appeal to the supreme court of the United States (*Neilson v. Oregon*, 212 U. S. 315, 53 L. Ed. 528-530), the court said:

Concurrent jurisdiction, properly so called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. (Citing cases.)

* * *

The present case is not one of the prosecution for an offense malum in se, but for one simply malum prohibitum. Doubtless the same rule would apply if the act were prohibited by each state separately; but where, as here, the act is prohibited by one state and in terms authorized by the other, can the one state which prohibits prosecute and punish for the act done within the territorial limits of the other? Obviously, the grant of concurrent jurisdiction may bring up, from time to time, many and some curious and difficult questions, so we promptly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it can not. It is not at all impossible that, in some instances, the interests of the two states may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state can not enforce its opinion against that of the other; at least, as to an act done within the limits of that other state. Whether, if the act of the plaintiff in error had been done within the territorial limits of the state of Oregon, it would make any difference, we need not determine; nor whether, in the absence of any legislation by the state of Washington authorizing the act,

> Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia. Neither is it necessary to consider whether the prosecution should be in the names of the two states jointly. It is enough to decide, as we do, that, for an act done within the territorial limits of the state of Washington, under authority and license from that state, one can not be prosecuted and punished by the state of Oregon.

In *Nicoulin v. O'Brien*, 172 Ky. 473, 80, it was held that, in view of the fact that when the state of Indiana was carved out of the former state of Kentucky, the state of Kentucky retained title to the entire bed of the Ohio river where it formed the boundary between said states, the state of Kentucky had jurisdiction over the entire stream between said states to enforce its laws relating to fishing therein. The judgment was affirmed by the supreme court of the United States in *Nicoulin v. O'Brien*, 248 U. S. 113, 63 L. Ed. 155 and 157, that portion of the opinion by Mr. Justice McReynolds material to the question here involved being as follows:

> The territorial limits of Kentucky extend across the river to low water mark on the northerly shore. *Ind. v. Ky.*, 136 U. S. 479, 519, 34 L. Ed. 329, 336, 10 Sup. Ct. Rep. 1051. And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia compact. See *Wedding v. Meyler*, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 33, 24 Sup. Ct. Rep. 322; *Central R. Co. v. Jersey City*, 209 U. S. 473, 52 L. Ed. 896, 28 Sup. Ct. Rep. 592; *Nielsen v. Oregon*, 212 U. S. 315, 53 L. Ed. 528, 29 Sup. Ct. Rep. 383; *McGowan v. Columbia River Packing Asso.*, 245 U. S. 352, 62 L. Ed. 342, 38 Sup. Ct. Rep. 129.

The foregoing authorities appear to have so definitely settled the question of what constitutes concurrent jurisdiction as the term relates to the authority of the states of Oregon and Washington over the waters of the Columbia river where same forms the boundary between them as to leave the question no longer open for argument, the sum and substance of the decisions of the supreme court of the United States being that concurrent jurisdiction authorizes and empowers either state to prosecute all violations of law that are malum in se; that each state has jurisdiction to prosecute violations of law that are malum prohibitum, provided the act is made such by the statutes of both states; that in cases where an act is malum prohibitum under the statutes of one state but not under the statutes of the other, the state in which it is prohibited may prosecute violations thereof committed on waters within its territorial limits, but that its jurisdiction does not extend beyond such territorial limits.

The question here presented is whether or not section 5 of chapter 188, General Laws of Oregon, 1915, as amended by chapter 292, General Laws of Oregon, 1919, is one necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction. If it be conceded that the amendment does change and alter an existing statute of the state of Oregon enacted at the same time that a similar statute was enacted by the state of Washington, it does not follow that such amendment and change is prohibited by the compact. It is very clear that the purpose of the states in the adoption of such a compact was to prevent any change in existing statutes of the two states necessary for regulating, protecting or preserving fish in the waters of the Columbia river, etc., or the enact-

ment of other laws having the same effect, by either state, except with the consent and approbation of the other. Is the law in question of the nature controlled by the compact? If it is of such a nature and the compact is a contract within the purview of that provision of the constitution prohibiting a state from enacting a law impairing the obligation of contracts, it would appear that the state of Washington might by appropriate action cause such a statute, enacted by the state of Oregon, to be declared invalid.

The meaning of the term "impair" is not technical and may be generally defined to mean "to injure," "to lessen." If such be the meaning of the term, does the statute involved impair the value of the compact to the state of Washington? Clearly not. The persons who are affected are not citizens of the state of Washington and it therefore has no interest in them based upon such a relation. The statute was not intended to affect the rights of persons granted a license by the state of Washington to exercise their privileges thereunder within the territorial limits of the state of Washington, but it was a lawful exercise of the police power of the state of Oregon in prohibiting aliens from fishing within the waters of this state, to the detriment of the citizens of this state. The appellant is not a citizen of the state of Oregon nor of the state of Washington, and he has none of the common rights of such citizens to fish the waters of the Columbia river. Any such right conferred upon him is purely a privilege which may be withdrawn in such manner as was adopted in the amendment of 1919.

If the state of Washington could maintain an action to have the Oregon statute as amended declared invalid, it does not follow that such right may be exercised by a citizen of that state and much less does it appear that it can be exercised by an alien who has no rights whatever

in the subject matter of the compact, except such as may have been conferred upon him as a mere privilege by the statutes of the said state. The licenses issued in prior years and the right of priority which might have existed before the amendment of 1919 did not constitute a property or vested right in any sense, and they can not, therefore, make appellant a party to the contract represented by the compact between the states of Oregon and Washington.

Green v. Biddle, 8 Wheat. 1, 16, 68, 5 L. Ed. 547, 551, 554, has been submitted by appellant in support of his contention. The seventh article of the compact made between Virginia and Kentucky upon the separation of the latter from the former state declares:

> That all private rights and interests of lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.

At page 551 of the report in L. Ed. Mr. Justice Story, in delivering the opinion of the court upon the first hearing, said:

> The seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia as valid and secure under the laws of Kentucky as they were under the then existing laws of Virginia.

The acts of the legislature of the state of Kentucky of the twenty-seventh of February, 1797, and of the thirty-first of January, 1812, materially changed the laws referred to in the compact with reference to the rights of the owners of land situated within the tract transferred from the state of Virginia to the state of Kentucky.

At page 568 (L. Ed.) of the opinion by Mr. Justice Washington, upon second hearing, it is said:

> If the law of Virginia has been correctly stated need it be asked whether the right and interest of such claimant is as valid and secure under this act as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think this can hardly be asserted. If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky court as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which have governed his case in the latter state.

Without going further into the details of the compact and the laws referred to in the opinion, it is very apparent that the said case is not an authority in support of appellant's contention in the instant case. In the former case the compact provided specifically for the protection of vested property rights of owners of land within the tract to be transferred from Virginia to Kentucky. A violation of the terms of the compact with reference to such rights was a matter in which such property owners were directly interested and their interests were separate and distinct from those of the state of Virginia.

In the instant case the laws relating to appellant's alleged rights which were in force at the date of the compact between Washington and Oregon prescribed the qualifications of alien applicants for a license to fish in the waters of the Columbia river. Section 5 of the Oregon act, which was practically identical with provisions of the Washington act, provided that licenses should not be issued to any person who is not a citizen of

the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the state of Oregon for one year immediately preceding the application for such license. By the amendment of 1919 Oregon did not permit an alien having less qualifications to fish the waters of the Columbia river, but, leaving the provisions of the existing law in full force and effect, provided, in addition thereto, that in so far as the waters within the exclusive jurisdiction of the state of Oregon is concerned,

> No license for taking or catching salmon or other shell fish, required by the laws of this state, shall be issued to any person who is not a citizen of the United States and who has not been an actual resident of the state for one year immediately preceding the application of (for) such license. * * *

It is difficult to conceive in what way this could have impaired the obligation of the contract, if the compact be such, between Washington and Oregon for regulating, protecting or preserving fish in the waters of the Columbia river.

In the case of *Green v. Biddle*, supra, the parties bringing the action were those for whose direct benefit one part, at least, of the compact was made. The compact directly and specifically recognized vested property interests on their part and provided for the preservation and protection of such interests. In the instant case the appellant was a mere licensee in preceding years, having no vested right to a new license. The compact between the states of Washington and Oregon was not made for his benefit, but, on the contrary, was made for the protection of the citizens of the respective states and to prevent either of said states from repealing or altering existing laws in such a manner as to make them less

efficient in protecting the interests of the people, or from enacting new laws which would reduce the protection to fish provided by existing laws.

Wharton v. Wise, 153 U. S. 155, 38 L. Ed. 669, is a case arising out of a compact between the states of Virginia and Maryland containing a provision that

> The right of fishing in the river shall be common to and equally enjoyed by the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

It was contended that under said provision a right was conferred upon a citizen of Maryland to take and catch oysters in the waters of Pocomoke Sound within the territorial limits of the state of Virginia, but the decision was upon the express ground that the right to take oysters from that location was not provided by the terms of the compact.

In *Bodley v. Taylor*, 5 Cranch 191, 3 L. Ed. 75, the court, by Mr. Justice Marshall, said (p. 84, L. Ed.):

> Neither is the compact between Virginia and Kentucky considered as affecting this case. If the same measure of justice be meted to the citizens of each state, if laws be neither made nor expounded for the purpose of depriving those, who are protected by that compact, of their rights, no violation of that compact is perceived.

That the rights of a citizen in a public contract are not of such a nature as will entitle him to bring an action on account of same where no provision is made for his special benefit is established by the decision of this court in the case of *German Alliance Ins. Co. v. Home Water*

Supply Co., 226 U. S. 220, 57 L. Ed. 195, 199, wherein the court held that

> In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different states. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who has made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings * * * but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Second Nat. Bank v. Grand Lodge, F. & A. M.*, 98 U. S. 124, 25 L. Ed. 76; *Cf. Hendrick v. Lindsay*, 93 U. S. 149, 23 L. Ed. 857; *National Sav. Bank v. Ward*, 100 U. S. 202, 205, 25 L. Ed. 623, 625.

In the *Dartmouth College* case, 4 Wheat. 629, it was expressly said by Mr. Chief Justice Marshall in delivering the opinion of the court

> that the provision of the constitution prohibiting states from passing laws impairing the obligation of contracts had never been understood to embrace other contracts than those which respect property or some object of value and confer rights which may be asserted in a court of justice.

In *Clark v. Kansas City*, 176 U. S. 114, 20 Supreme Court S. C. T. 284, 44 L. Ed. 392, 96, this court, by Mr. Justice McKenna, said:

> The court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it.

The effect of a compact upon the general powers of one of the parties thereto in matters of legislation is illustrated in the case of *Hawkins v. Barney's Lessee*, 5 Peters 457, 8 L. Ed. 190, wherein it was contended that the "occupying claimants" and "seven years' possession" acts of Kentucky violated the seventh and eighth, and particularly the seventh, article of the compact between Virginia and Kentucky.

In commenting upon the decision of the court in *Green v. Biddle*, Mr. Justice Johnson, in delivering the opinion of the court, said (p. 193, L. Ed.):

> And when again upon looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws, the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject, they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia would be regarded as an unaffected compliance with the compact.

The policy of restricting aliens in the exercise of fishing privileges in the waters over which the states of Oregon and Washington have concurrent jurisdiction is shown to have been sanctioned by the principles and practice of Washington in the enactment of its statute of 1915, and the exercise by the state of Oregon of its

sovereign power to further restrict the rights of such aliens in this state is in accord with the policy and practice of the state of Washington, and in no sense violates the terms of the compact between the states regulating the catching of fish in the waters of the Columbia river.

In *Hooker v. Burr*, 194 U. S. 415, 48 L. Ed. 1046, the court, by Mr. Justice Peckham, said (p. 1050, L. Ed.):

> We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law, before the courts will listen to his complaint. *Tyler v. Registration Judges*, 179 U. S. 405, 45 L. Ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. Ed. 70, 74, 23 Sup. Ct. Rep. 20.

In *Cram v. Chicago, etc. R. Co.*, 85 Neb. 586, 19 Ann. Cas. 170, the defendant assailed an act of the legislature of 1905. The court, by Mr. Justice Dean, said (p. 173, Ann. Cas.):

> Until defendant is shown affirmatively to have been injured, he can not be heard to complain that the act under which the suit is brought is unconstitutional. The rule is thus stated in Cooley, Constitutional Limitations (7th Ed.) 232: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." In *Clark v. Kansas City*, 176 U. S. 114, 20 S. Ct. 284, 44 U. S. (L. Ed.) 392, Mr. Justice McKenna cites with approval the foregoing language of Judge Cooley, and adds: "We concur in this view, and it would be difficult to add anything to its expression." *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252: "Statutes are not to be declared unconstitutional at the suit of one

who is not a sufferer from their unconstitutional provisions. * * * We can not set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others." In *In re Willington*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631, the court, speaking by Shaw, C. J., says: "Where an act of the legislature is alleged to be void, on the ground that it exceeds the limits of legislative power, and thus injuriously affects private rights, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected." The following authorities fairly support plaintiff's contention: *People v. Brooklyn, etc. T. Co.*, 89 N. Y. 75; *Williamson v. Carlton*, 51 Me. 449; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 300; *Currier v. Elliott*, 141 Ind. 394, 39 N. E. 554; *Switzerland County v. Reeves*, 148 Ind. 467, 46 N. E. 995, 6 Am. & Eng. Enc. of Law (2d Ed.) 1090; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Sullivan v. Berry*, 83 Ky. 198, 4 Am. St. Rep. 147; *Jones v. Black*, 48 Ala. 540; *Moore v. New Orleans*, 32 La. Ann. 726; *McKinney v. State*, 3 Wyo. 721, 30 Pac. 293; *Dejarnett v. Haynes*, 23 Miss. 600; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Small v. Hodgen*, 1 Litt. (Ky.) 16; *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Albany County v. Stanley*, 105 U. S. 305, 26 U. S. (L. Ed.) 1044.

In *Union Fishermen Co. v. Shoemaker*, 193 Pac. 476, 194 Pac. 854, 98 Or. 659, it was contended that a statute of the state of Oregon prohibiting the sale or possession of salmon taken beyond the three mile line outside of the Columbia river during the closed season for that river impaired the obligation of the compact. At page

678 of the Oregon report, the court, by Mr. Justice Harris, said:

> The next contention urged by the plaintiffs is that the compact between the states of Washington and Oregon is a contract, and that it is therefore protected by the state and federal constitutions against legislation impairing its obligations: *Green v. Biddle*, 8 Wheat. 1 (5 L. Ed. 547); *Poole v. Fleeger*, 11 Pet. 185 (9 L. Ed. 680); *Virginia v. Tennessee*, 148 U. S. 503 (37 L. Ed. 537, 12 Sup. Ct. Rep. 728); *Wharton v. Wise*, 153 U. S. 155 (38 L. Ed. 669, 14 Sup. Ct. Rep. 783, see also Rose's U. S. Notes).
>
> For the purposes of the instant case we shall assume, without attempting to decide, that the compact entered into between Oregon and Washington is binding upon both parties to the extent that one can not withdraw without the consent of the other, and that therefore one state can not, without the "consent and approbation" of the other state, enact any law which would conflict with the terms of the compact. Again directing attention to the compact, we observe that the two states have expressly limited their agreement to laws and regulations "which would affect said concurrent jurisdiction." As ruled by the United States circuit court of appeals for the ninth circuit in *Olin v. Kitzmiller*, 268 Fed. 348, recently decided: "It is only as to its common right with the adjoining state to take fish from those waters that its right is limited by the compact." This state has not attempted to change the closed season. The prohibition of the Oregon statute is operative only during the periods which both states have fixed as the closed seasons on the Columbia. The inhibition of section 5 merely aids in keeping such seasons closed. Section 5 does not "affect" the "concurrent jurisdiction" of the two states, and, indeed, it recognizes, rather than ignores, the jurisdiction which the two states have concurrently exercised.

In the district court of the United States for the district of Oregon, Mr. Justice Bean, in his memorandum opinion in the instant case, said:

> At the time this compact became effective the laws of each of the states authorized the issuance of licenses to take salmon in the Columbia river to aliens who had declared their intention to become citizens, and no change in that regard has been concurred in by the state of Washington. It is therefore argued that the act of the Oregon legislature is void because in violation of the compact or agreement with the state of Washington.
>
> The law is presumed to be valid and will not be otherwise declared by the courts unless clearly so. On the contrary, the courts will endeavor to so construe the law and the compact as to give effect to both. Assuming, without deciding, that the compact is broad enough to apply to set nets on the Oregon side of the river and within the boundaries of the state, it nevertheless does not appear to me that it limits the right of either state to prescribe the qualifications of persons who shall be licensed to take fish. It is by its terms confined to matters for regulating, protecting, and preserving fish, that is, providing the time and manner of taking fish, the number which may be taken, the apparatus and appliances which may be used and other matters which have a tendency to preserve and protect the fish, none of which are in any way affected by the qualifications of persons who shall be permitted to take fish; the dominant fact to be accomplished by the compact was the protection and preservation of fish, and this was to be done by laws and regulations of the two states having that object in view.
>
> However, if I am mistaken in this, and the act of 1919 is in violation of the compact, the complainant has no right in court to question same. No vested rights of his were interfered with or impaired by the legislature. A license to

> take fish is a privilege granted by the state, and the licensee has no vested right to a renewal of one previously issued.

Appellees submit that the opinion of the circuit court of appeals in the instant case is a clear statement of the effect of the compact upon appellant's rights in this matter.

It should be noted that the concurrent jurisdiction of the states of Washington and Oregon is limited to the waters of the Columbia river. That it does not extend to the bed of the stream or fixtures attached thereto is well settled.

In *Eagle Cliff Fishing Company v. McGowan*, 70 Or. 1, the method of construction and operation of set nets is explained. We quote from the statement of facts beginning at page 4 of the report:

> The defendants herein, as copartners, undertaking to operate under the licenses last mentioned, anchored to heavy rocks, put into the river in front of these sites, and at right angles with the current, wooden buoys, about 4 feet long, and 6x6 inches wide, indicating the lines intended to be occupied by nets 150 to 360 feet in length to be set from 550 to 950 feet apart, and also placed in that stream, about forty feet below the line of low water and in front of these sites, a steel cable about 1,200 feet in length, which wire rope was fastened at each end and in the middle to heavy iron rails that were sunk by a hydraulic pump into the sand to the depth of about a foot. To this cable were attached buoys, the defendants intending to moor thereto vessels having machinery with which seines could be operated and the salmon that might be thus encircled removed without dragging the net to the shore.

In *State v. Blanchard*, 96 Or. 79, at page 99 of the report, drift nets and set nets are defined as follows:

> A drift net is a net with both ends free to drift with the current; a set net is one fastened at one or both ends so that the whole net can not drift with the current and notwithstanding this be in a condition to take fish.

In *McGowan v. Columbia River Packers Association*, 245 U. S. 352, 62 L. Ed. 342, this court held that the concurrent jurisdiction of the state of Washington did not extend to the removal of a nuisance such as the set nets described in the *Eagle Cliff Fishing Co. v. McGowan* case because it did not reach the bed of the stream, and the officers of the state of Washington would have no authority to intermeddle with the defendants' nets anchored to the bed of the river within the territorial limits of the state of Oregon. Citing *Wedding v. Meyler*, 192 U. S. 573, 585, 48 L. Ed. 570, 575.

Appellant insists that he was deprived of his license through a conspiracy between the appellees and representatives of the legislature. The seventh assignment of error is that:

> The court erred in holding that it could not inquire into the motives and influences which prompted the enactment of Oregon Laws, 1919, Chapter 292.

It is alleged in paragraphs 7 and 8 of the complaint (pages 14 to 17 of the transcript) that a conspiracy was entered into between the appellees to deprive appellant of his licenses and to provide that the license to which he was entitled should be issued to the appellee, Kitzmiller, and that as a result of such conspiracy the act known as

chapter 292, General Laws of Oregon, 1919, was enacted. Had such a conspiracy been entered into with the results alleged, it is very apparent that it could have no effect upon the validity of the act of 1919, alleged to have been enacted as a result thereof. The policy of moral justice or expediency of a statute is not to be considered by the judiciary in determining its validity.

2 Lewis' Sutherland Stat. Const., Sec. 496, p. 925.

6 Am. & Eng. Enc. of Law, 2d Ed., 1087, and cases cited.

Fletcher v. Peck, 6 Cranch 87.

Doyle v. Continental Ins. Co., 94 U. S. 535.

Stoppenback v. Multnomah County, 71 Or. 509.

Respectfully submitted,

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